Petition

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NO.

IN THE

Supreme Court of the United States

October Term, 1981

RONALD MOORE
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

JERRY SHEPHERD
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the doctrine enunciated by this Court in United States v. Enmons, 410 U.S. 396 (1973), which precludes certain federal criminal prosecutions under the Hobbs Act for alleged violent activity occuring during the course of a labor dispute applies equally to prosecutions under the Organized Crime Control Act?

2. Whether the government's vicious attack on defense counsel's integrity in closing argument denied petitioners' their right to counsel and due process of law guaranteed by the Fifth and Sixth Amendments to the United States Constitution?

3. Whether a trial judge may consistent with due process of law guaranteed by the Fifth Amendment to the United States Constitution withhold sentencing but let the conviction stand on a criminal charge which he finds insufficient evidence to support?

4. Whether petitioner Moore was denied due process of law required by the Fifth Amendment to the United States Constitution by his conviction of wire fraud in the absence of any evidence of a scheme or intent to defraud an insurance company as charged in the indictment?

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The petitioners, Ronald Moore and Jerry Shepherd, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 18, 1982.

OPINION BELOW

The unpublished opinion of the Court of Appeals appears in the Appendix hereto. The District Court of Virginia entered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 18, 1982. This petition for certiorari was filed within sixty days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, . . . nor be deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defense.

18 U.S.C. § 844(i):

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an

explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; . . .

18 U.S.C. § 1343:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce,

any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1951:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000

or imprisoned not more than twenty years, or both.

STATEMENT OF THE CASE

Following a jury trial in the Western District of Virginia the petitioners, Ronald L. Moore and Jerry Shepherd who were tried together, were found guilty of conspiring to damage or destroy property, i.e. a Long Airdox Auger owned by defendant Moore's company, by means of explosives and aiding and abetting the destruction of such property by means of explosives in violation of 18 U.S.C. § 844(i). In addition, petitioner Moore was convicted of wire fraud in violation of 18 U.S.C. § 1343 and 2 in connection

with the alleged filing of an insurance claim on the damaged mining equipment.

On October 17, 1980, the District Court consolidated sentencing for both defendants on the conspiracy and aiding and abetting counts. On these two counts, the Court imposed on defendant Moore a fine of $10,000.00, of which fine $2,500.00 was suspended. Defendant Shepherd was fined $10,000.00 on these counts and the Court suspended $5,000.00 of the fine. The Court suspended the imposition of any prison sentence for both defendants but placed them on three years probation. On the wire fraud count, defendant Moore was ordered to pay a fine of $1,000.00. Both defendants were ordered to perform 100 hours of community service.

Both petitioners appealed and their convictions on all counts were affirmed by the Fourth Circuit on January 18, 1982.

Petitioner Ronald L. Moore was the co-owner of a coal operation known as T. M. Coal Company, Inc. operating in Lee County, Virginia during the period relative to the three charges. Petitioner Jerry Shepherd was employed as a labor consultatnt with Southeastern Employers Service Corporation known as SESCO in Bristol, Tennessee. SESCO was retained by T. M. Coal Company for consulting work during the period relative to the offenses charged.

The evidence introduced at petitioners' trial showed that on December 8, 1977, two days after the beginning

of a nationwide strike by the United Mine Workers of America, a Long Airdox Auger owned by T. M. Coal Company, which was idle and had not been used for several months prior to the strike, was destroyed by dynamite.[1] The government's case came from the testimony of alleged co-conspirators and one employee granted immunity from prosecution. According to the government's theory of the case, Bill Evans, who was in charge of the mine operation, along with several other company employees

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[1] The facts set out here were developed at the petitioners' trial before the Honorable James Turk that was held in October, 1980. The relevant portions of the trial transcript are contained in the appendix filed with the Fourth Circuit Court of Appeals consisting of two volumes of consecutively numbered pages.

who wanted to continue working and not participate in the strike, conceived the plan of blowing up the auger the afternoon of December 7, 1977 while in a trailer housing the company office at Purcell, Virginia, in order to obtain police protection and make the union look bad. These employees were admittedly drinking and smoking marijuana that afternoon in the office trailer. According to this evidence, which was disputed, Shepherd was placed at the office trailer that afternoon. The scheme allegedly took form and was planned after defendant Shepherd is alleged to have said, "Something drastic has to happen."

The evidence against defendant Moore in regard to the conspiracy count consisted only of testimony from

Bill Evans, regarding two alleged telephone conversations between Evans and Moore not heard by anyone else.

Defendant Moore was not present at this office trailer during any of this time and is not implicated as having discussed such a plan with anyone other than Evans. Evans never directly stated that defendant Moore was involved but Evans testified that at the conclusion of the second telephone conversation, ". . . It was still set to do it." (Emphasis added.)

As to the first conversation Evans testified that ". . . I don't know what was really said through the whole conversation - I think I explained to him. . ." what Shepherd allegedly recommended. No other evidence was presented that would indicate Moore

participated in the actual carrying out of the plan and when asked by the Court whether Moore made any suggestions regarding the scheme Evans said, "No".

The only evidence produced against defendant Shepherd in regard to the aiding and abetting count was that he rode in a vehicle with employee and co-conspirator Michael Fouts, who was granted immunity from prosecution, when Fouts went to obtain the prima cord for the dynamite from another location on the property. Bill Bandy, the employee who transferred prima cord to Fouts testified that it was done out of the vehicle and out of Shepherd's presence and that Shepherd remained in the vehicle. Fouts also testified that there was no discussion

regarding any scheme to dynamite the auger or any other equipment during their trip from the office to the other location and back. Fouts' pre-trial statement to the ATF agent did not mention Shepherd at all.

The indictment regarding the wire fraud count against petitioner Moore charged that Moore and Evans devised and intended to devise a scheme to defraud the Continental Insurance Company and that Moore, for the purpose of executing the scheme caused Evans to instruct Cindy Yeary,[2] to transmit a wire communication. Cindy Yeary , a former bookkeeper of

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[2] Cindy Yeary is not related to defendant Moore's co-counsel, Emmitt F. Yeary, by blood or marriage.

the coal operation testified that a phone report of the loss was made by her to an insurance agency but there was no evidence of any instructions from defendant Moore or Evans that a claim be filed as charged and there was no evidence from Evans or any other witness that there was any scheme to defraud the insurance company or profit in any way as a result of the alleged conspiracy to blow up the auger. The only evidence linking Moore to the insurance claim was that he inquired about it at some subsequent date. There was also evidence that the insurance policy provided only for payment of fair market value of the auger and not the policy limits.

Both petitioners testified in their own behalf and denied all charges

against them.

At the conclusion of the government's case both defendants moved the court to strike the evidence as to the conspiracy and aiding and abetting counts. The court stated:

> It seems like to me the aiding and abetting is real weak as to both of the defendants. I just don't see any evidence of Mr. Moore's aiding and abetting.

Prior to submitting the case to the jury the court decided that the defendants would not be punished on both counts in view of the lack of evidence. The court said:

> Well, he isn't going to be punished for. . . I mean, if the jury convicts him, he's not going to be sentenced on both.

The District Court denied defendants' motions for new trials and the Fourth Circuit Court of Appeals affirmed their convictions.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT ALLOWING THE GOVERNMENT TO PROSECUTE PETITIONERS FOR ALLEGED VIOLENT ACTIVITY OCCURING DURING THE COURSE OF AN ECONOMIC STRIKE IS INCONSISTENT WITH THIS COURT'S DECISION IN UNITED STATES v. ENMONS, 410 U.S. 396 (1973) AND CONSTITUTES AN IMPROPER INCURSION INTO THE CRIMINAL JURISDICTION OF THE STATES.

In the case of United States v. Enmons, 410 U.S. 396 (1973) several defendants were charged with violations of the Hobbs Act, 18 U.S.C. § 1951. That section provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or

> affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

At the time of the alleged conspiracy the employees of the Gulf States Utilities Company were involved in an economic strike. The indictment charged five specific acts of violence in furtherance of a conspiracy to force the company to agree to a contract with a local of the International Brotherhood of Electrical Workers calling for higher wages and other

monetary benefits. The violence included firing high powered rifles at three company transformers, draining the oil from a company transformer, and blowing up a transformer substation owned by the company. In affirming the district court's dismissal of the indictments this Court held that:

> . . . [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such

> an unprecedented incursion into the criminal jurisdiction of the States. (Citations omitted.)
>
> As we said last Term:
>
> '[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.' (Citations omitted.) (Emphasis added.) 410 U.S. at 411, 412.

The petitioners were prosecuted and convicted for alleged violent activity occuring during the course of the 1977 strike of the United Mine

Workers of America in violation of 18 U.S.C. § 844(i), a part of the Organized Crime Control Act of 1970. That statute provides in pertinent part:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; . . .

In both Enmons and the present case the setting was an economic strike with employees making legitimate economic demands for better wages and benefits and the employer legitimately resisting those economic demands. In Enmons the union engaged in violence which was clearly illegal, including

the blowing up of a transformer substation, to attain the legitimate objectives of increased wages and benefits. In the present case the only difference, which is not a difference of substance but of form only, is that the alleged guilty parties are employer representatives who allegedly used illegal means to attain the legitimate objectives of resisting economic demands and obtaining police protection from union violence. The only additional distinction between the Enmons situation and the present case is that the federal criminal statute involved in Enmons was contained in the Hobbs Act, 18 U.S.C. § 1951, and the federal criminal statute in the present case is contained in the

Organized Crime Control Act of 1970, 18 U.S.C. § 844(i). The very important questions posed in both cases involve the sensitive nature of federal-state relations and more specifically the balance of federal and state criminal jurisdiction. Assuming their guilt arguendo, petitioners submit that the Enmons doctrine should apply equally to this case.

Despite the fact that both Enmons and the present case involve economic strike settings and federal criminal statutes similar in nature, the Fourth Circuit refused to apply the jurisdictional parameters of Enmons to this case saying that "in the absence of clear direction from Congress or the Supreme Court, we decline to do so."

(App. p. 5a.).

The Enmons doctrine was applied to 18 U.S.C. § 844(i) by the United States District Court for the Central District of California in the case of United States v. Thordarson, 487 F.Supp. 991 (C.D.Cal. 1980).

The District Court in Thordarson concluded that absent specific authorization from Congress, the Enmons doctrine precluded federal criminal prosecution for violent activity which occurs during the course of a labor dispute and found that § 844(i) enacted as part of the Organized Crime Control Act of 1970, (PL 91-452), does not provide such authorization. The Thordarson district court said:

> Although the application of § 844 may not be limited solely to organized crime,

> there is clearly no indication of any intent by the Congress to extend federal criminal prosecution into the labor field. In fact, any such congressional intent is even less apparent in § 844 than in the Hobbs Act which was considered in the Enmons case. . . 487 F.Supp. at 995.

The Court of Appeals for the Ninth Circuit reversed the district court in Thordarson. United States v. Thordarson, 646 F.2d 1323 (9th Cir. 1981). Judge Norris, writing for the Ninth Circuit, concluded that Enmons ". . . carve(d) out a narrow exemption from a federal extortion statute on the basis of its language and legislative history. . .". 646 F.2d at p. 1330. The Ninth Circuit limited the Enmons doctrine to the extortion statute without discussing the federal-state

criminal jurisdictional balance issue which was also a basis for the Enmons decision. Certiorari was not sought for the Ninth Circuit's opinion in Thordarson.

Petitioners submit that the Thordarson district court reasoned correctly in applying the Enmons doctrine to 18 U.S.C. § 844(i) and that any ambiguity must be resolved in favor of lenity. 410 U.S. at 411.

The application of the Enmons doctrine to other federal criminal statutes and to the employer in the labor dispute context is a very important question of federal law which has not been, but should be, settled by this court. It is an issue likely to recur and one that the Circuit Courts are not likely to address absent

direction from this court.

II. THE GOVERNMENT'S VICIOUS ATTACK ON DEFENSE COUNSELS' INTEGRITY IN CLOSING ARGUMENT DENIED PETITIONERS THEIR RIGHT TO COUNSEL AND DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In his closing argument Assistant U. S. Attorney Morgan Scott warned the jury:

> . . . [O]ur profession, lawyers, particularly defense attorneys in criminal cases, are the only profession that is paid to confuse people. It's the only one. Architects can't do it. They'd be sued. Doctors can't do it. They'd be sued. But, lawyers, criminal defense attorneys, are paid to confuse you. They're paid to create doubts in your mind, whether they're justified by the evidence or not. (Emphasis added.)

The U. S. Attorney's comments were tantamount to calling defense counsel "crooks" and "liars". Because the case involved substantial credibility issues and this attack was directed not at the evidence or at defendants but directly at defendants' counsel, petitioners submit that this misconduct influenced the jury's decision and abrogated their most fundamental of constitutional rights, the right to counsel, beyond redemption. Petitioners submit that this argument constituted a breach of petitioners' right to counsel as a matter of law and was so outrageous and prejudicial that the damage done was incurable.

As the Fourth Circuit apparently recognized in its opinion:

> We do agree with the defendants that the United States Attorney made improper comments in the closing argument to the jury. . . Both the attack on the integrity of defense counsel and the appeal to convict on the basis of the defendants' appearance are comments unbefitting the office of United States Attorney. . . . (App. p. 6a.).

The U. S. Attorney's personal attack on defense counsel immediately stripped petitioners of representation by officers of the court of professional integrity and created a prejudice so great that it can be said that the misconduct influenced the jury's verdict. See Bailey v. United States, 410 F.2d 1209 (10th Cir. 1969), cert. denied, 396 U.S. 933 (1969). Petitioners submit that the United States Attorney's misconduct flawed the pro-

ceeding beyond redemption and could not have been corrected by an instruction. The district court had the opportunity to correct the misconduct on petitioners' motions for new trial but failed to do so.

III. DEFENDANTS WERE DENIED DUE PROCESS BY REASON OF CONVICTIONS FOR AIDING AND ABETTING THE CONSPIRACY WHEN THE COURT FOUND INSUFFICIENT EVIDENCE BUT REFUSED TO DISMISS.

At the conclusion of the governments' case both defendants moved that the court strike the conspiracy and aiding and abetting counts. In the dialogue that followed the motions the court stated:

> It seems like to me the aiding and abetting is real weak as to both of the defendants. I just don't see any evidence of Mr. Moore's aiding

and abetting.

The court reasoned that it could cure its failure to strike the aiding and abetting count in spite of the insufficient evidence by deciding in advance to mitigate the punishment. In this regard the court said:

> Well, he isn't going to be punished for. . . I mean, if the jury convicts him, he's not going to be sentenced on both.

Petitioners submit that the court's finding of insufficient evidence, especially in regard to defendant Moore and the court's conscious decision not to impose punishment on that count was a denial of due process in violation of petitioners' Fifth Amendment rights. Basic due process would have required dismissal of the

charge and for the court to rationalize a felony conviction with the imposition of lenient punishment is an affront to justice requiring the intervention of this court.

IV. PETITIONER MOORE WAS DENIED THE DUE PROCESS OF LAW REQUIRED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HIS CONVICTION OF WIRE FRAUD IN THE ABSENCE OF ANY EVIDENCE OF A SCHEME OR INTENT TO DEFRAUD.

Petitioner Moore was also convicted of violating 18 U.S.C. § 1343 which provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign

> commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (Emphasis added.)

To prove wire fraud, the government must show a scheme to defraud, criminal intent to defraud and use of interstate communications. See United States v. Cowart, 595 F.2d 1023, n. 10, (5th Cir. 1979).

This Court has also required, as in mail fraud cases, that the use of wire communications be "incident to an essential part of the scheme". Pereira v. United States, 347 U.S. 1, 8 (1954).

The record in this case is devoid of any evidence that petitioner Moore participated in devising or intended

to devise any scheme to defraud the insurance company as charged in the indictment. The record contains some evidence that a wire communication was made by the T. M. Coal Company bookkeeper but there is no evidence that this communication was made "for the purpose of executing such scheme. . ." and no evidence that there ever was any scheme to obtain money. On the contrary the government's entire theory of the case was that the alleged scheme was to obtain police protection for the company employees who wanted to continue working during the strike and to make the union look bad. In addition, the evidence at trial showed that the insurance policy on the equipment would only have paid the

fair market value for the equipment and not the policy limits, indicating that Mr. Moore's financial position would not have changed.

While a jury is not required to find that any particular scheme actually contemplated the use of the wires or mails, it is essential that such use be incident to a scheme to defraud. There is no evidence of such a scheme in this case nor of any intent to defraud the insurance company.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that this Court should issue a writ of certiorari to the Court of Appeals for the Fourth

Circuit to review its decision.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-5004

United States of America,

Appellee,

versus

Ronald Moore,

Appellant.

No. 81-5005

United States of America,

Appellee,

versus

Jerry Shepherd,

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge.

Argued December 11, 1981.
Decided January 18, 1982.

Before WINTER, Chief Judge, PHILLIPS, and MURNAGHAN, Circuit Judges.

Mary Lynn Tate (Emmitt F. Yeary, Yeary & Tate, P.C. on brief) for Appellants; Thomas J. Bondurant, Jr., Assistant United States Attorney (John S. Edwards, United States Attorney on brief) for Appellee.

PER CURIAM:

Jerry Shepherd was convicted on one count of conspiring to and one count of aiding and abetting the explosion of a mining auger in violation of 18 U.S.C. §§ 844(i) and 2. His co-defendant, Ronald Moore, was convicted on these counts and an additional count of interstate wire fraud in violation of 18 U:S.C. §§ 1343 and 2. On appeal they raise eleven assignments of error. We find no reversible error, and therefore affirm the convictions.

I

The defendants first assert that the evidence was insufficient for a jury to convict on any count. After reviewing the record in the light most favorable to the government, United States v. Sherman, 421 F.2d 198 (4th Cir. 1970) (per curiam) we conclude that there was sufficient evidence for a jury to have found that Shepherd, Moore and other officials of the T.M. Coal Company, owned by Moore, conspired to blow up a mining auger valued at some $60,000, with the hope of blaming it on the United Mine Workers, who had begun a nationwide strike two days before, and thereby inducing the local sheriff's department to protect their mining operation from the striking miners. There was testimony that

Shepherd had initiated the plan by saying that something drastic had to be done, and that he was present when the details were formulated. There was also testimony that Moore was contacted by phone and approved the plan,[1] and was instrumental in covering up the plan after the FBI began investigations. Finally, we think there was sufficient evidence that Moore approved of his bookkeeper's reporting the loss to the insurance carrier in violation of § 1343.

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[1] Defense counsel stressed in their brief and at oral argument that Evans, when testifying about his phone conversations with Moore, said only that "when I got off of the phone it was still decided to go do it." We simply disagree with counsel's assertion that a jury could not properly infer from this testimony, corroborated by other evidence, that Moore approved the plan.

II

The defendants also assert that Congress did not intend to criminalize labor violence when it enacted 18 U.S.C. § 844(i), prohibiting the malicious damage or destruction, by means of an explosive, of any property used in interstate commerce. They base their argument on United States v. Enmons, 410 U.S. 396 (1973), where the Court held that the government could not prosecute the use of violence to achieve legitimate union objectives under the Hobbs Act, 18 U.S.C. § 1951. We are not aware of any court that has extended the Enmons holding to 18 U.S.C. § 844(i). In the absence of clear direction from Congress or the Supreme Court, we decline to do so. Accord, United States v. Thordarson,

646 F.2d 1323 (9th Cir. 1981) (reversing district court's dismissal of indictment charging union officials with violence under § 844(i).

III

We do agree with the defendants that the United States Attorney made improper comments in the closing argument to the jury. He warned the jury that "lawyers, particularly defense attorneys in criminal cases, are the only profession that is paid to confuse people. . . . They're paid to create doubts in your mind, whether they're justified by the evidence or not." He also cautioned the jury not to be impressed "by the two hundred dollar suits and alligator shoes" worn by the defendants. Both the attack on the integrity of defense counsel and the

appeal to convict on the basis of the defendants' appearance are comments unbefitting the office of United States Attorney, and were deserving of condemnation and appropriate corrective action by the district court if they had been made the subject of objection.

However, defense counsel failed to object at the time or to ask later for a corrective instruction, and we do not think the conduct rises to the level of plain error sufficient to warrant retrying the case. The trial court cannot be faulted for failing to react sua sponte for it may well have thought that defense counsel, as a strategic decision, thought it best not to emphasize the comments by having the court instruct on their impropriety. In any event, we do not think the

closing argument, read in the context of the entire case, caused the defendants to receive an unfair trial.

IV

The defendants raise some nine other assignments of error, alleging that the evidence was insufficient to prove an interstate commerce nexus or that the defendants acted with malice, that the defendants were denied their constitutional right to a speedy trial, that they were entitled to separate trials, that the indictment was improper and unfairly read to the jury, and that the court made incorrect evidentiary rulings, improperly interrogated witnesses, and displayed a bias towards the government. After hearing oral argument, reviewing the briefs, and examining the record on

appeal, we find that none of these allegations justify overturning the judgment below.

V

For the reasons above, we affirm the convictions entered by the district court.

AFFIRMED.

Opposition

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ALEXANDER L. STEVAS,
CLERK

No. 81-1742

In the Supreme Court of the United States

OCTOBER TERM, 1981

RONALD MOORE AND JERRY SHEPHERD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 844(i), a provision of the Organized Crime Control Act of 1970 prohibiting, *inter alia*, the destruction, by means of an explosive, of property used in any activity affecting interstate commerce, applies when the proscribed conduct occurs during a labor dispute.

2. Whether petitioners were prejudiced by remarks made by the prosecutor in summation.

3. Whether the evidence was sufficient to sustain petitioners' convictions on a theory of aiding and abetting.

4. Whether the evidence was sufficient to sustain petitioner Moore's conviction for wire fraud.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1742

RONALD MOORE AND JERRY SHEPHERD, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1982. The petition for a writ of certiorari was filed on March 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a joint jury trial in the United States District Court for the Western District of Virginia, petitioners were convicted of conspiracy to use explosives to damage property used in an activity affecting interstate commerce, in violation of 18 U.S.C. 371 and 844(i), and of aiding and abetting the use of the explosives, in violation of 18 U.S.C. 2

and 844(i). Petitioner Moore was also convicted of wire fraud, in violation of 18 U.S.C. 1343. The conspiracy and aiding and abetting counts were consolidated for sentencing, and petitioners Moore and Shepherd were placed on three years' probation and fined $7,500 and $5,000 respectively. Petitioner Moore was fined $1,000 on his conviction for wire fraud. Both petitioners were also required to perform 100 hours of community service. (Pet. 5-6).

The evidence at trial showed that on December 6, 1977, the United Mine Workers of America began a nationwide strike. In an effort to maintain operations petitioner Moore, the co-owner of the T.M. Coal Company, hired petitioner Shepherd, an employee of a firm of consultants that gave advice on the handling of labor disputes (2 Tr. 11-14, 88-91, 344-345).[1] On December 8, 1977, petitioner Shepherd met with officials of Moore's company to discuss how to keep the coal mine operational in the face of union efforts to keep it closed. Petitioner Shepherd suggested that they could get police protection and possibly an injunction against the union if "something drastic" happened, such as something being "blown up" (2 Tr. 97-98,206). One of the company officials then suggested that they could blow up an auger, a piece of heavy equipment used in coal mining. This same official then called petitioner Moore, who agreed to the plan (1 Tr. 126-129; 2 Tr. 98-99, 206-208). Dynamite, a blasting cap, and a fuse were obtained from another of Moore's mines, and one of the company officials who had participated in the meeting with Shepherd set the charge. On the evening of December 8, 1977, a dynamite blast destroyed the auger (1 Tr. 117-118, 129-130, 165-167; 2 Tr. 99-103, 207-210).

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[1]References to the trial transcript ("Tr.") are cited by volume and page number.

In accordance with the earlier advice of petitioner Shepherd, within hours of the bombing company officials (petitioner Moore's subordinates) began to seek extensive publicity for the bombing. Telephone calls were made to newspapers, the police, the Governor, and the White House. An injunction against the union was also obtained, although it does not appear that the bombing was the basis for the injunction (2 Tr. 103-105, 211-212). After the bombing, petitioner Moore's bookkeeper in Virginia telephoned the company's insurance agent in West Virginia and reported the loss of the auger. Although it was unclear whether petitioner Moore discussed the insurance claim with his bookkeeper prior to this call, he inquired about the claim subsequently and discussed litigation concerning the claim (1 Tr. 173-176; 2 Tr. 5-9, 43, 332, 349-350).

ARGUMENT

1. Petitioners contend (Pet. 15-25) that the prohibition in the Organized Crime Control Act of 1970, 18 U.S.C. 844(i), against damaging property by means of explosives does not reach otherwise prosecutable conduct if that conduct occurs during the course of a legitimate economic strike. There is no merit to this claim.

Petitioners rest their argument on this Court's decision in *United States* v. *Enmons*, 410 U.S. 396 (1973), which held that the Hobbs Act, 18 U.S.C. 1951, does not reach the threat or use of violence to attain legitimate union objectives. Petitioners contend that the *Enmons* holding should be extended to the different statute at issue here. An identical contention was recently rejected in a well-reasoned opinion of the Ninth Circuit, *United States* v. *Thordarson*, 646 F. 2d 1323 (1981), cert. denied, No. 81-643 (Nov. 16, 1981). Accord, *United States* v. *Chambers*, 515 F. Supp. 1 (N.D. Ohio, 1981). As the Ninth Circuit explained (646 F. 2d at 1326-1327), the *Enmons* holding rested on the Court's construction of the term "wrongful" in the Hobbs Act and on

legislative history manifesting a specific congressional intent to exclude violence occurring in the pursuit of collective bargaining objectives from the reach of that statute. No such language appears in 18 U.S.C. 844(i), and petitioners can cite no legislative history specifying a labor dispute exclusion.[2] There is, therefore, no basis for concluding that the conduct in which petitioners conspired—using explosives to destroy a large piece of mining equipment—should be exempted from 18 U.S.C. 844(i) even though it falls squarely within the statute's language.[3]

2. In his summation to the jury, one of the prosecutors asserted (3 Tr. 109-110):

> [T]he facts are much simpler than these people would have you believe. Because our profession, lawyers, particularly defense attorneys in criminal cases, are the only profession that is paid to confuse people. It's the only one. Architects can't do it. They'd be sued. Doctors can't do it. They'd be sued. But, lawyers, criminal defense attorneys, are paid to confuse you. They're paid to create doubts in your mind, whether they're justified by the evidence or not.

As the court of appeals observed (Pet. App. 7a), petitioners' counsel neither objected to these comments when they were made nor later requested a curative instruction to remedy any possible prejudice. While condemning the remarks as improper, the court of appeals correctly concluded (*id.* at 6a-7a) that the trial court's failure to give any instruction to

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[2]The House Report explaining the provision that became 18 U.S.C. 844(i) indicates that no exemptions of any sort were contemplated. H.R. Rep. No. 91-1549, 91st Cong., 2d Sess. 36 (1970).

[3]Moreover, even in the specific context of the Hobbs Act to which *Enmons* applies, it is not clear that the union activities exclusion would apply equally to management activities such as are involved here.

the jury concerning the remarks did not rise to the level of plain error requiring retrial of the case. See *United States* v. *Shovea*, 580 F. 2d 1382, 1391 (10th Cir. 1978), cert. denied, 439 U.S. 986 (1978) and 440 U.S. 908 (1979); *United States* v. *Esposito*, 523 F. 2d 242 (7th Cir. 1975), cert. denied, 425 U.S. 916 (1976). The court of appeals certainly was not required to conclude that these obviously self-serving comments by the prosecutor influenced the jury's verdict in the case. The issue does not warrant further review by this Court.

3. Petitioners argued to the court of appeals that the evidence was insufficient to support their convictions on any of the counts. The court of appeals took note of specific record evidence and rejected the argument (Pet. App. 3a-4a). Petitioners—who, as conspirators in a criminal plan that was actually carried out, could have been indicted as principals in the commission of the underlying offense (*Pinkerton* v. *United States*, 328 U.S. 640, 646-647 (1946))—do not now challenge the sufficiency of the evidence on the conspiracy charge, but argue that the evidence is insufficient to support the aiding and abetting counts. They correctly do not contend that vacation of the convictions on the aiding and abetting counts would make any difference in their sentences, but assert that the district judge erroneously allowed the charges to go to the jury only because he knew he could impose a single sentence for both the conspiracy and aiding and abetting counts. Since the issue is of no practical direct or collateral significance to petitioners, the case is an appropriate one for application of the concurrent sentence doctrine.

In any event, it is not evident that the district court finally concluded that the evidence was insufficient to go to the

jury.[4] Even if it did, the claim of error is insubstantial and purely academic if—as we submit—the court of appeals was correct in concluding that there was sufficient record evidence to permit a finding of guilty on all counts. The evidence showed that petitioner Shepherd suggested the plan to blow something up (1 Tr. 125-126). Petitioner Moore's action in approving the plan was equally critical, since the explosion was to take place on his company's property, using the blasting materials from one of his mines. Moreover, Billy Paul Evans, the company's vice-president for operations, who spoke with Moore about Shepherd's plan (2 Tr. 99-101, 182-183), relied on Moore to "make the last decision" whether to proceed with it and would not have gone forward with the plan without Moore's approval (2 Tr. 85, 112, 113).[5] This is sufficient support for an aiding and abetting conviction. See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949); *United States* v. *Honeycutt*, 311 F. 2d 660, 662 (4th Cir. 1962).

4. Petitioner Moore contends (Pet. 30-33) that the evidence of wire fraud was insufficient because it did not include evidence of his direct participation in the use of the telephone or evidence of a scheme to obtain money. The contention is without merit.

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[4]After expressing doubts concerning evidence against petitioner Moore on the aiding and abetting count (2 Tr. 243-244), the trial judge overruled the defendants' motions as to all the counts except the aiding and abetting counts, and took the latter under advisement (2 Tr. 247). He appeared to be influenced partly by a belief that evidence of the conspiracy was somehow not relevant to the aiding and abetting count (2 Tr. 244). There is no indication that when the trial judge finally submitted the case to the jury, he believed that the government had not made out a prima facie case.

[5]Evans and another of Moore's employees were indicted in the scheme, pled guilty to the conspiracy count prior to trial, and testified for the government (2 Tr. 84, 214).

As noted above, petitioner Moore does not now challenge his conviction on the charge of conspiring to blow up the auger. Given his participation in such a plan, together with evidence (1) that before the plan had been devised, Moore had told Evans that he would not mind seeing the auger, which had been idled for several months, destroyed (2 Tr. 56, 92, 202-203), (2) that Moore's bookkeeper made an interstate telephone call to file an insurance claim on the auger after it was destroyed by explosives (2 Tr. 7-8), (3) that Moore checked with her on the status of the claim (2 Tr. 43, 350), (4) that he discussed litigation of the claim with an attorney in a Chapter 11 bankruptcy proceeding involving Moore's company that commenced several months after the auger was destroyed (2 Tr. 332, 349-350), and (5) that filing and following up on an insurance claim on the auger would foreseeably involve use of interstate wire communications, since the insurance claims office was in West Virginia and Moore's office was in Virginia (1 Tr. 171-176), the jury had ample basis for concluding that petitioner Moore violated the wire fraud statute, 18 U.S.C. 1343. See *Pereira* v. *United States*, 347 U.S. 1, 8-9 (1954); *United States* v. *Calvert*, 523 F. 2d 895, 903-904 (8th Cir. 1975), cert. denied, 424 U.S. 911 (1976).

It is frivolous to suggest (see Pet. 32-33) that the submission of the insurance claim falsely concealing the conspiracy of Moore and his associates to destroy the auger was not a fraudulent scheme because petitioner Moore's "financial position" would be the same after payment of the claim as it would have been had Moore not connived in the destruction of the auger in the first place. The insurance company would be defrauded whether or not petitioner Moore expected that he would reap net financial benefits in addition to having the insurance company, in effect, fund the scheme to discredit the union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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